

CATCHWORDS

IMMIGRATION - cancellation of visas - giving of incorrect information by holder of visa in her application for the visa - decision by Minister's delegate to cancel visas - application by holder for review of Immigration Review Tribunal's decision affirming delegate's decision - allegation that Tribunal's decision to affirm induced or affected by fraud within para 476 (1) (f) of Migration Act 1958 - whether fraud must be that of Tribunal or of a party or a party's representative - whether real suspicion of fraud enough - standard of proof of fraud - whether evidence established that decision in fact induced or affected by fraud.

Migration Act 1958 s 476 (1) (f)

R v Emmett (1988) 14 NSWLR 327 (CA)

Briginshaw v Briginshaw (1938) 60 CLR 336

Wentworth v Rogers (No 5) (1986) 6 NSWLR 534 at 538-539

Murillo-Nunez v Minister for Immigration and Ethnic Affairs (1995) 63 FCR 150 (Einfeld J)

Singh v Minister for Immigration and Ethnic Affairs, unreported, FCA/Lockhart J 18 October 1996

GRACE PUSHPA WATI v MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS

No NG 41 of 1996

Lindgren J
Sydney
29 November 1996

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)
GENERAL DIVISION)

No NG 41 of 1996

BETWEEN:

GRACE PUSHPA WATI

Applicant

AND:

MINISTER FOR IMMIGRATION AND ETHNIC
AFFAIRS

First Respondent

GABRIEL FLEMING CONSTITUTING THE
IMMIGRATION REVIEW TRIBUNAL

Second Respondent

CORAM: Lindgren J
PLACE: Sydney
DATE: 29 November 1996

MINUTE OF ORDERS

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the respondents' costs.

NOTE: Settlement and entry of orders is dealt with in
Order 36 of the Federal Court Rules.

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REASONS FOR JUDGMENT

GENERAL INTRODUCTION

The applicant Grace Pushpa Wati ("Ms Wati") applies, in exercise of the right given to her by s 476 of the Migration Act 1958 ("the Act"), for review of a decision of the Immigration Review Tribunal ("the IRT") on 19 December 1995. That decision affirmed a decision of a delegate of the first respondent ("the Minister").

The IRT's Reasons for Decision commence by stating that the delegate's decision was to cancel a Transitional (Permanent) visa and a Class 155 (Resident Return) visa held by Ms Wati. Yet the Reasons make it clear that Ms Wati entered Australia

on 10 November 1990 as the holder of a Class 100 (Spouse) visa. The then s 14 and sub-s 20 (1) of the Act, if the

conditions of their operation were satisfied, would have operated to make her an illegal entrant.

As a result of amendments to the Act which came into force on 1 September 1994, sub-s 115 (3) (see especially para 115 (3) (c)), provided that the new provisions for the cancellation of visas applied to, inter alia, a person who had been an illegal entrant by reason of the operation of s 20.

Regulation 16 of the Migration Reform (Transitional Provisions) Regulations which came into force concurrently with the amendments, provided that a person who would have been an illegal entrant by reason of the operation of the previous s 20, became the holder of a Transitional (Permanent) visa.

Apparently Ms Wati also applied at some time after she entered Australia for, and was granted, a Class 155 Resident Return visa. Apparently she had wished to travel overseas and return to Australia.

In the result, there is apparently no slip in the IRT's reference to the delegate's decision as a decision to cancel Ms Wati's Transitional (Permanent) visa and Class 155 (Resident Return) visa.

The delegate's decision which the IRT affirmed had been made on 20 October 1995 ("the Cancellation Decision"). The reason given for the Cancellation Decision was that Ms Wati had "made false statements in a material particular on her migration application and that those statements were ones capable of affecting the visa decision."

RELEVANT LEGISLATIVE PROVISIONS

Subdivision C (ss 97-115) of Division 3 of Part 3 of the Act is headed, "Visas based on incorrect information may be cancelled". Section 101 within Subdivision C provides as follows:

"101. *A non-citizen must fill in his or her application form in such a way that:*

- (a) all questions on it are answered; and*
- (b) no incorrect answers are given."*

Section 99 provides that any information that a non-citizen gives in relation to that person's application for a visa is taken for the purposes of, inter alia, para 101 (b) of the Act to be an answer to a question in his or her application form, whether the information is given orally or in writing and whether at an interview or otherwise.

Section 107 sets out a procedure which the Minister must follow if he considers that the holder of a visa who has been

"immigration cleared" did not comply with, inter alia, s 101. In effect, the procedure ensures that a visa-holder is given an opportunity to show cause why his or her visa should not be cancelled. Section 108 requires the Minister to consider any response from a visa holder and to decide whether there has been a non-compliance by the visa holder in the way described in the notice given to the holder under s 107.

Section 109 is as follows:

"109. (1) The Minister, after:

- (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
- (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107 (1) (b); and
- (c) having regard to any prescribed circumstances;

may cancel the visa.

- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled."**

There are "prescribed circumstances" for the purpose of para 109 (1) (c). Migration Regulation 2.41 provides as follows:

"2.41. For the purposes of paragraph 109 (1) (c) of the Act, the following circumstances are prescribed.

- (a) *the correct information;*
- (b) *the content of the genuine document
(if any);*
- (c) *the likely effect on a decision to
grant a visa or immigration clear the*

visa holder of the correct information or the genuine document;

- (d) the circumstances in which the non-compliance occurred;*
- (e) the present circumstances of the visa holder;*
- (f) the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act;*
- (g) any other instances of non-compliance by the visa holder known to the Minister;*
- (h) the time that has elapsed since the non-compliance;*
- (j) any breaches of the law since the non-compliance and the seriousness of those breaches;*
- (k) any contribution made by the holder to the community."*

In its Reasons for Decision, the IRT addressed in turn the matters referred to in paras (a)-(k) of Migration Regulation 2.41 if and as they applied to the circumstances of the case.

Application to this Court for a review of a decision of the IRT may be made only on any one or more of the grounds specified in sub-s 476 (1) of the Act. The only ground which was pressed on the hearing was the following one referred to in para 476 (1) (f):

"That the decision was induced or affected by fraud ...;"

Ms Wati's case is not that the fraud was that of the IRT, but that it was the fraud of another or others and was perpetrated on the IRT.

INTRODUCTION TO FACTS AND DRAMATIS PERSONAE

Ms Wati, a citizen of Fiji, arrived in Australia on 10 November 1990 as the holder of a Class 100 (Spouse) visa. (In one place the IRT's Reasons for Decision record the date of arrival as 10 January 1990 but this is clearly incorrect.) She made her original Application for Permanent Residence in Fiji on 22 May 1990 and a declaration by her of that date was attached to her Application. She claimed to be the spouse of Kamal Darwiche ("Mr Darwiche"). It was not in dispute before the IRT that when Ms Wati arrived in Australia on 10 November 1990, Mr Darwiche was already living here; that he did not know that she was coming until he learned of her presence in Australia by accident quite some time later; and that Ms Wati and Mr Darwiche did not begin living under the same roof until October 1994 when the Department of Immigration and Ethnic Affairs ("the Department") commenced investigating Ms Wati's case.

Ms Wati has a sister named Malti Kumari ("Ms Kumari"). During the period of some four years to which I have just referred, Mr Darwiche continued an already long established relationship with Ms Kumari. It was not in dispute before the IRT that

that relationship had extended back to 1987. In that year, Mr Darwiche and Ms Kumari had travelled from their home in Australia to Fiji for a visit, and Ms Kumari had introduced Mr Darwiche to her sister, Ms Wati.

Ms Wati maintained a relationship with Mr Naresh Prasad ("Mr Prasad") during the period of some four years from late 1990 to late 1994 to which I referred earlier; lived with him as from March 1991; and was in a sexual relationship with him in and from 1992. Apparently they had also lived together in Suva from June 1989 to February 1990 (see later).

There was evidence before the IRT that Mr Darwiche visited Fiji not only in 1987, but also in 1988, 1989 and 1990; that he arrived there on 18 May 1990 and that within a few days of his arrival he and Ms Wati married; that no religious ceremony was held and that there was no celebration of the marriage; that no friends or relatives attended the ceremony; that Ms Wati moved into a flat for one month so that she and Mr Darwiche could stay together and consummate the marriage; that on 22 May 1990, only days after the marriage, Ms Wati made an application to migrate to Australia as Mr Darwiche's spouse; and that Mr Darwiche returned to Australia on 2 June 1990.

The Department was prompted to investigate Ms Wati's case by accusations made against her to the Department in September

1994 by one, Saleem Buksh ("Mr Buksh"). Mr Buksh had been the landlord of Ms Wati and Mr Prasad when they had lived at 13 Kingfisher Avenue, Hinchinbrook beginning in August 1991. Mr Buksh and his wife, Katija Bi Ahmed ("Ms Ahmed"), had lived upstairs and Ms Wati and Mr Prasad had lived downstairs. In 1993, he sold them the house and apparently they have continued to live there since. Subsequently to the sale, there was legal disputation between him and them arising out of the sale. In July 1994 Ms Wati and Mr Prasad sought advice from a solicitor. Two months later, on 22 September 1994, Mr Buksh called at the Department's Bankstown office and "informed on" Ms Wati.

Mr Buksh gave evidence at the hearing before the IRT on 15 November 1995. He died on 18 May 1996. His widow, Ms Ahmed, has sworn an affidavit in this proceeding in support of Ms Wati's application.

The IRT found that Ms Wati had given the following incorrect information in her application for migration to Australia:

- "*Ms Wati did not disclose Mr Darwiche's previous marriages or de facto relationship with her sister Malti Kumari;*
- Ms Wati in interviews with Departmental officers and in evidence to the Tribunal, gave false information concerning her relationship with Mr Naresh Prasad."*

It has not been in issue that these grounds, if they were available, were appropriate to support the Cancellation Decision.

BACKGROUND FACTS IN MORE DETAIL

Ms Wati's case before the IRT and now this Court has been that Mr Buksh practised a fraud for the purpose of harming Ms Wati by deceiving the IRT. The following chronological account of the background facts is based on the IRT's Reasons for Decision.

On 22 May 1990, Ms Wati signed an Application for Migration to Australia to which was attached a declaration by her.

On 25 September 1990, Ms Wati was interviewed by officers of the Department in connection with her application.

On 10 November 1990, Ms Wati arrived in Australia as the holder of a Class 100 (Spouse) visa.

On 20 March 1992, a letter which was referred to before me as "the Latchmi letter" was sent, purportedly by one named "Latchmi", to the then Minister for Immigration, Local Government and Ethnic Affairs. For convenience a copy of the Latchmi letter is annexed to these Reasons for Judgment. As will be seen later, Ms Wati's case is that the Latchmi letter

was on the Departmental file relating to her which was before the IRT, was composed by Mr Buksh, was typed by one, Manjula Chandra for him, and was signed either by him or by someone else at his instigation.

On 9 September 1992, Mr Prasad, apparently with the help of Mr Buksh, completed an Application to Remain Permanently in Australia (Form 903). In the Application, Mr Prasad nominated Ms Wati as his de facto marriage partner. In the Application they claimed to have lived together at the following addresses:

June 1989-February 1990 20 Sese Street, Samabuca, Suva.

March 1991 2/30 Bathurst Street, Liverpool.

April 1991-August 1991 5/94 Bigg Street, Liverpool.
(There was before the IRT a rental bond receipt for Ms Wati and Mr Prasad in respect of 5/94 Bigg Street, Liverpool).

August 1991-19 December 1995 (the date of the IRT's decision) 13 Kingfisher Avenue, Hinchinbrook. (Until some time in 1993, this property was owned by Mr Buksh but in that year apparently he sold it to Ms Wati and Mr Prasad. There was before the IRT a statement from Mr Buksh's wife, Ms Ahmed, stating:

"I have known Mr Naresh and Mrs Grace Pushpa Wati Prasad after their arrival in Australia. Since I met them I found them very happy couple. On 24/8/91 they became my tenant and lived in my granny flat until today.")

Mr Prasad's Application to Remain Permanently in Australia was not lodged with the Department at the time but was kept by Mr Prasad at home at 13 Kingfisher Avenue, Hinchinbrook where he

and Ms Wati were living.

In 1993, Mr Buksh sold the property at 13 Kingfisher Avenue, Hinchinbrook to Ms Wati and Mr Prasad.

In July 1994, Ms Wati and Mr Prasad consulted a solicitor in relation to their dispute with Mr Buksh.

On 22 September 1994, Mr Buksh attended upon Carol B O'Connor, Manager, Compliance, at the Bankstown Office of the Department. He told her that he had met Ms Wati in Fiji around 1987 when she had asked him to enter into a "marriage of convenience" with her or to organise one for her; that he had declined; that, nonetheless, they had remained on friendly terms; that she had subsequently come to an arrangement for marriage with Mr Darwiche whom she described as her brother-in-law because he was living with her sister, Malti; and that she had told him (Mr Buksh) that she had paid Mr Darwiche \$5,000 to marry her.

Mr Buksh showed Ms O'Connor the completed Form 903 application which he said he had helped Ms Wati and Mr Prasad to fill in. He told Ms O'Connor that he had taken it to the Department at the time (September 1992) for them but had discovered that it was not acceptable because of the date of Ms Wati's arrival in Australia. Mr Buksh left the form with Ms O'Connor. The form

is referred to in the IRT's Reasons for Decision as one which was on the Department's file which was before the IRT. As noted earlier, the form identified Ms Wati as Mr Prasad's de facto spouse and asserted that they had been living together since 1989, first in Fiji and then in Australia. Mr Prasad told the IRT that this was not the case and that in Fiji he had not been in a relationship with Ms Wati but said that they had been living together in Australia since 1991 and had developed a sexual relationship. Consistently with this evidence, of course, Ms Wati's marriage to Mr Darwiche might have been "genuine" and only broken down after she arrived in Australia.

Before me, an affidavit by Ms Ahmed, the widow of Saleem Buksh, was read on behalf of Ms Wati. Included in Ms Ahmed's affidavit (on which Ms Ahmed was not cross examined) is the following:

"8. I recall on one occasion Saleem Buksh told me that he had removed an Immigration Form from Mrs Watis [sic] home. He showed the form to me and I recall that it had '903' on it. My Husband said to me 'I'm going to give this to the Immigration'."

Ms Wati's case before me is that the late Mr Buksh completed the form; that the form was not to be lodged with the Department; and that without her or Mr Prasad's consent, Mr Buksh had removed it from their home and taken it to the

Department's Bankstown office on 22 September 1994.

On the same day, 22 September 1994, Mr Buksh signed a statutory declaration which, apparently, he also left with Ms O'Connor. It was also on the Department's file which was before the IRT. It was as follows:

"I, Saleem Buksh of 6 Wilson Rd Hinchinbrook do solemnly and sincerely declare that I first met Grace Pushpa Wati in Suva about 1987. That time she asked me to arrange a marriage of convenience for her, I say I could not do it. When she came to Australia in Nov 1990 she was met by Naresh Prasad. She started liveing [sic] with him from when she arrived and has continued liveing with him to today. They lived together in a flat under my house from August 1991 until I sold the house to them in december [sic] 1993. They still liveing in the house together as de factos. While they were living at Bigg St Liverpool Mrs Wati told me she paid Kamal Darwiche \$5,000 to marry her."

On 11 May 1995, the Department sent to Ms Wati a "Notice of Intention to Cancel" her visas (cf s 107 of the Act referred to earlier). The notice asserted that information supplied in Ms Wati's application and at her interview on 25 September 1990 had been misleading for reasons which were specified. The reasons included reference to the statutory declaration by Mr Buksh. As well, they included the following:

"On 9/12/94 Mr Darwiche told me he had started living with you from 8/10/94. Around the same time Mr Darwiche was given a full time job by one of your brothers."

The notice concluded that on the available evidence, the signatory was "satisfied on the high balance of probabilities that the marriage which formed the basis of the grant of a visa to you was in fact contrived" and that "the Australian Embassy in Suva would not have granted a visa to you if it had known your marriage was not genuine."

Ms Wati, through her agent, Mr T Laba Sarkis of Laba Migration Services, provided a lengthy and detailed response. Among other things, the response asserted that Mr Darwiche had met Ms Wati in 1987 in her dress shop in Suva, "Grace Fashion", and had become very fond of her; that he had travelled again to Fiji in December 1989 to visit her; that on his next visit in May 1990, he married her; that the ceremony took place in Suva on 21 May 1990; and that Ms Wati had come to Australia to be with her husband, Mr Darwiche. It said that "because of infrastructure delay" she had had only two days in which to advise Mr Darwiche of the date and time of her proposed arrival in Australia. The letter asserted that Ms Wati had been unable to contact Mr Darwiche by telephone; that she had encountered "many family disputes" because she was leaving her family to join her new husband in Australia; that she had arrived in Australia and even tried to contact Mr Darwiche at the airport without success; and that she had subsequently contacted her friend, Mr Prasad, with whom she was able to stay until her husband, Mr Darwiche, who had fallen upon hard

times financially and was unemployed, was able to provide her with the financial security necessary to enable her to live with him. The "response" to which I have just referred was signed by Ms Wati and Mr Darwiche.

On 13 October 1995, notwithstanding this response, the Minister's delegate made the Cancellation Decision in respect of Ms Wati's visas. On 20 October 1995, Ms Wati applied to the IRT for a review of the delegate's decision.

On 15 November 1995, the hearing before the IRT took place. There was oral evidence from Ms Wati, Mr Darwiche, Ms Kumari, Ms Elnabouche (Mr Darwiche's sister), and Mr Prasad. As well, oral evidence was given by the late Mr Buksh. Ms Wati was assisted by a registered migration agent. The IRT's Reasons for Decision record that the IRT "had before it the Departmental files in relation to Ms Wati" and extensive written submissions from her adviser.

On 18 December 1995, the day before the IRT's decision was given, Ms Ahmed signed a statutory declaration before Michael Cossetto, solicitor. A copy of that statutory declaration is annexed to these Reasons for Judgment. It appears from the "received" stamp on it that it was received by the IRT on 19 December 1995, the very day of the IRT's decision.

On 23 January 1996, the present application by Ms Wati was filed in this Court.

On 18 May 1996, Mr Buksh died.

EVIDENCE BEFORE THE COURT ON THE PRESENT APPLICATION

Ms Wati read three affidavits on the hearing and tendered two documents. No deponent was cross examined.

The first affidavit to be considered is that of Ms Ahmed sworn 10 November 1996. Ms Ahmed deposed that she married Mr Buksh in 1988 and lived with him until his death on 18 May 1996. She annexed to her affidavit, her statutory declaration dated 18 December 1995 to which I referred above. Her affidavit said this:

- "4. Saleem Buksh prepared the Statutory Declaration. He forced me to sign the Statutory Declaration. He told me I had to go to a Solicitor at Liverpool to sign a document.
5. My late Husband kept a gun in the house and I was generally afraid of him.
6. The information in the Statutory Declaration is incorrect.
7. I was aware that my late Husband had a fight with Grace Wati and that he was dealing with the Immigration Department and trying to have her forced to leave Australia.
8. I recall on one occasion Saleem Buksh told me that he had removed an Immigration Form from Mrs Watis [sic] home. He showed the form to me and I recall it had '903' on it. My Husband said to me 'I'm going to give this to the Immigration'."

The next affidavit to be considered is that of Manjula Chandra sworn 12 November 1996 who swore that she typed the Latchmi letter, for Mr Buksh. Her affidavit included the following:

- "4. The circumstances surrounding the typing of this letter are that I was visiting Saleem Bukshs [sic] home. He asked me if I would type a letter for him. He handed me a handwritten letter that I then typed and handed back to him.
5. During 1992 I visited the home of Saleem Buksh nearly every weekend. In 1993 I became his tenant occupying the upstairs part of his home at 6 Wilson Road, Hinchinbrook.
6. Saleem Buksh never spoke to me about anybody named 'Latchmi' nor am I aware of anybody by that name visiting Saleem Buksh."

The final affidavit read on behalf of the applicant was an

affidavit of Mr Prasad sworn 10 November 1996. In fact only paragraph 6 of that affidavit was read. That paragraph is as follows:

"6. In about 1992 Grace Wati sought advise [sic] from Saleem Buksh about brining [sic] her children to Australia. He suggested that we complete a Form 903. At about this time he helped us complete a form 903. I recall him saying to me words to the effect:

'You fill this in and her children can come'

The form was not correct and was never lodged with the Immigration Department. Sometime later the form disappeared from my home. The next time I saw the form was when it was produced in the Immigration Review Tribunal."

Ms Wati did not give evidence.

OUTLINE OF PARTIES' SUBMISSIONS

Outline of applicant's submissions

The applicant submits that in order to satisfy para 476 (1) (f), it is incumbent upon her to prove only that there is "a real possibility" or "a real suspicion" or "a suggestion" that the IRT's decision was induced or affected by fraud. This submission of law lies at the heart of Ms Wati's case. In support of it, counsel for Ms Wati has referred to R v Emmett (1988) 14 NSWLR 327 (CA) esp at 336E, F (Lee J), 339C (Enderby J) and 339F (Grove J).

Ms Wati points to various pieces of evidence which, she

submits, would support my making a finding of fact favourable to her on this issue. First, the Departmental file was before the IRT and was coloured by the presence in it of the Latchmi letter, the notes of Ms O'Connor's interview with Mr Buksh on 22 September 1994, and Mr Buksh's statutory declaration of that date. Secondly, as would have been evident from the file, the Department had been moved to investigate Ms Wati's case by Mr Buksh's contacting the Department in September 1994. Thirdly, Mr Buksh gave evidence before the IRT and its Reasons for Decision refer to his evidence. Fourthly, the only direct evidence that Ms Wati's marriage in Fiji to Mr Darwiche was a "sham" is evidence given by Mr Buksh that Ms Wati had admitted to him that it was.

Outline of Minister's submissions

The Minister submits that as a matter of construction para 476 (1) (f) refers to fraud by the relevant Tribunal (in the present case, the IRT, but potentially also the Refugee Review Tribunal ("RRT")). In the alternative, the Minister submits that the paragraph refers to fraud of a "party" or a person or persons representing a party, in the present context, Ms Wati or the Department, or their respective representatives. If either the primary or alternative submission should be accepted, Ms Wati's application fails.

The Minister submits that even if fraud by any person

suffices, the IRT's decision must have been actually induced or affected by the fraud, although it may have been induced or affected by other factors as well. According to the submission, Ms Wati must prove actual inducement or affection on the balance of probabilities, with due regard to the caution sounded in such cases as Briginshaw v Briginshaw (1938) 60 CLR 336, The Minister v Tweed Byron Aboriginal Land Council (1990) 71 LGRA 201 and Wentworth v Rogers (No 5) (1986) 6 NSWLR 534 at 538-539, but she has failed to do so.

REASONING

Whose fraud?

The Minister submits that the reference to "actual bias" in para 476 (1) (f) is a reference to the actual bias of the decision-maker and that this fact indicates that the fraud to which the paragraph refers is also that of the decision-maker. I do not accept the second limb of the submission.

The reference to "actual bias" clearly draws upon the familiar distinction between "actual bias" and "reasonable apprehension of bias", as a ground of appeal against, or review of, a decision of a court or tribunal (see, for example, Livesey v New South Wales Bar Association (1983) 151 CLR 288; Re Maurice, Aboriginal Land Commissioner; Ex parte Attorney-General (1987) 17 FCR 422 (FC); Australian National Industries Ltd v Spedley Securities Ltd (in liq) (1992) 26 NSWLR 411

(CA)). It is improbable in the extreme, that in its reference to "actual bias", the legislature entertained a broader frame of reference, encompassing bias on the part of a person other than the decision-maker, such as a witness. It is often to be expected that witnesses will be biased in favour of or against a party. On the other hand, it is expected that a decision-maker such as the IRT will not be subject to bias of that kind, and, indeed, will seek to make allowance for, and so to neutralise, the bias of witnesses. Finally, against the above background, to construe the reference to "actual bias" as extending to the actual bias of persons other than the decision-maker would be an expansive construction of para 476 (1) (f) - a construction which would sit uncomfortably with the purpose of the amendments made by the Migration Reform Act 1992, of limiting judicial review. (In Murillo-Nunez v Minister for Immigration and Ethnic Affairs (1995) 63 FCR 150, Einfeld J held that the bias to which para 476 (1) (f) refers must be found in the decision-maker. See too Singh v Minister for Immigration and Ethnic Affairs, unreported, FCA/Lockhart J, 18 October 1996 at 5-10.)

The foregoing considerations persuade me to think that the fact that the "actual bias" referred to in para 476 (1) (f) is that of the decision-maker, has no bearing on the identity of the person whose fraud is referred to in that paragraph.

There is nothing in the concept of "fraud" itself which suggests that the fraud referred to in the paragraph is limited to that of the decision-maker or of a party or a party's representative. Moreover, although the amending Act of 1992 limited the grounds of judicial review, I find no reason to think that the fraud referred to in para 476 (1) (f) was intended to be limited in the way suggested by the Minister. Indeed, it is easy to accept that the legislature may have wished to ensure that a decision would be able to be reviewed where it was induced or affected by the fraud of some person. Assume, for example, that a decision of the IRT adverse to an applicant for a protection visa had been procured by the fraud of the individual's opponents: in such a case, Australia would fail to observe its obligations under the Convention Relating to the Status of Refugees through no fault of the Minister or of the IRT, but as a result of a fraud perpetrated by others. It is not surprising to contemplate that the legislature might have wished, in such a case, that the fraud be able to be exposed and its effects remedied in this Court.

In sum, I see no reason to limit the notion of the fraud to which para 476 (1) (f) refers to that of the IRT or of a party's representative. Rather, I think that in this respect the paragraph bears its plain meaning and so refers to the fraud of any person.

"Reason for suspicion" or "actual inducement or affection"

The competing submissions of the Minister and Ms Wati raise a question as to the proper construction of the expression "induced or affected by fraud". In my view, these words signify that the decision must be shown to have been actually induced or affected by fraud.

Counsel for Ms Wati has referred to R v Emmett (1988) 14 NSWLR 327 (CCA) esp at 336E, F (Lee J), 339C (Enderby J) and 339F (Grove J). That case was an appeal against conviction. There was evidence from two members of the jury that certain sheriff's officers who were in charge of the jury had said things to them while the jury was in retirement considering its verdict. In the New south Wales Court of Criminal Appeal, Lee J, with whom Grove J agreed, said that he was satisfied that the jury's verdict was influenced or infected and that it must be set aside. His Honour said that he found it unnecessary to consider whether the same result would have followed if the two jurors had claimed that they had not been influenced, although he added:

" ... the very nature of the misconduct alleged, with its strong inherent tendency to influence, would no doubt be a significant matter for consideration resolving that question." (at 336F)

This passage assumes that the question to be resolved is

whether there was influence in fact.

Enderby J, on the other hand, said that it was not essential to prove actual influence and that it sufficed that there was "a real suspicion that [the jurors or some of them] may have been so influenced" (at 339C). However, his Honour also accepted that at least two jurors had in fact been influenced. Clearly, all three judges accepted that actual influence had been proved. Therefore, as a matter of decision, the case is not authority for the proposition that even under the general law applicable to convictions for crime, suspicion of influence, as distinct from actual influence, suffices as a ground of interference.

It is, of course, necessary in the present context to distinguish between what must be proved and the means of proving it. A finding that a decision was influenced by fraud may be arrived at by a process of inference. If it is proved that something apt to influence a decision came to attention, it may be appropriate to infer that it influenced the decision in fact. Such an inference may be more readily drawn in some cases than in others. Moreover, in particular circumstances, an evidentiary onus may shift to the party contending that there was no influence. But, at the end of the day, as a matter of principle there is no ground for interference in the absence of actual influence.

In my view, as a matter of construction, the terms of para 476 (1) (f), require proof that the IRT's decision was in fact induced or affected by fraud.

Briginshaw v Briginshaw (1938) 60 CLR 336

The standard of proof according to which Ms Wati must establish that the IRT's decision to affirm the delegate's decision was induced or affected by fraud is the civil one, usually referred to as "the balance of probabilities". But an allegation of fraud is a serious one not to be made lightly, and it is perhaps a particularly grave thing to allege, not only that a fraud was perpetrated against the victim of it, but that it was also practised on a court or tribunal conducting a hearing.

In Wentworth v Rogers (No 5) (1986) 6 NSWLR 534 at 538-539, Kirby P (with whom Hope and Samuels JJA agreed) stated six principles which govern the exercise of equitable jurisdiction to set aside inter partes judgments for fraud. It must not be overlooked that the present jurisdiction is statutory and relates to the decisions of an administrative tribunal on application to it for review of an administrative decision. The ground of the jurisdiction is simply "that the decision was induced or affected by fraud ..."

In my opinion, some of the principles to which his Honour referred do not apply in the present context and others do. I have already held, in effect, that his Honour's fifth principle, that "it must be shown by admissible evidence that the successful party was responsible for the fraud which taints the judgment under challenge" (at 539D), does not apply. On the other hand, I have also held, in effect, that his Honour's third principle, that "mere suspicion of fraud, raised by fresh facts later discovered, will not be sufficient to secure relief" (at 538G), does apply. With reference to a situation in which A knowingly obtains a judgment against B by fraud, Kirby P was able to say:

"As in all actions based on fraud, particulars of

the fraud claimed must be exactly given and the allegations must be established by the strict proof which such a charge requires: Jonesco v Beard [1930] AC 298 at 301; McHarg v Woods Radio Pty Ltd [[1948] VLR 496] (at 497)." (at 538D)

In my view, the general thrust of this observation is applicable in the present case. While the standard of proof according to which Ms Wati must show that the IRT's decision was induced or affected by fraud is "the balance of probabilities" or "reasonable satisfaction", it is important to recall Dixon J's warning in Briginshaw v Briginshaw, supra:

"But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences." (at 362)

It is possible, but I think unnecessary, to refer to the many cases in which heed has been paid to this dictum where fraud has been alleged. I think it sufficient to emphasise that Ms Wati must establish nothing less than that a fraud was practised and that that fraud was at least a factor that induced or affected the IRT's decision.

Does the evidence establish the existence of fraud and that the IRT's decision was induced or affected by that fraud?

The IRT's decision was to affirm the Cancellation Decision. The IRT's Reasons for Decision provide an account of the evidence which was before it and state certain findings. The Reasons carefully distinguish between the two, by means of the headings "EVIDENCE" and "FINDINGS".

The opening paragraphs of the "FINDINGS" are as follows:

"The Tribunal must first determine whether there has been a 'non-compliance' with the Act. The Tribunal finds that Ms Wati in her Application for Migration to Australia gave incorrect answers to the questions asked. In coming to this finding the Tribunal has taken into account information and answers given to Departmental officers (and evidence in the Departmental file) and to the Tribunal.

The Tribunal finds that Ms Wati gave the following incorrect information in her application:

- Ms Wati did not disclose Mr Darwiche's previous marriages or de facto relationship with her sister Malti Kumari.*
- Ms Wati in interviews with Departmental officers and in evidence to the Tribunal gave false information concerning her relationship with Mr Naresh Prasad.*

The Tribunal did not find Ms Wati, Mr Darwiche or Ms Kumari to be wholly credible or reliable witnesses. The Tribunal is of the view that the objective evidence concerning the relationship between Ms Wati and Mr Darwiche points overwhelmingly to a conclusion that they were not in a genuine and continuing relationship as husband and wife at the time of the application. This evidence is detailed below under 'the correct information'.

The Tribunal sets out its further findings in accordance with the circumstances which are prescribed in regulation 2.41. The Tribunal has

taken these circumstances and Ms Wati's response to the notice of cancellation into account in making its decision."

The passage set out above is followed by the IRT's consideration of the matters referred to in paras (a) to (k) of Migration Regulation 2.41 which were set out earlier. Under the headings "(a) The correct information", "(d) The circumstances in which the non-compliance occurred" and "(f) The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act", further findings are made. In my opinion, the Reasons for Decision make plain that the IRT's critical findings as to the true facts which demonstrated that Ms Wati's application contained incorrect information, did not depend at all on the evidence of Mr Buksh.

I have referred above to the evidence led by Ms Wati on the present application. As well, I have referred to the fact that in its Reasons for Decision the IRT acknowledged that it had "had before it the Departmental files in relation to Ms Wati" which contained the Latchmi letter, the notes of Ms O'Connor's interview of Mr Buksh on 22 September 1994, and Mr Buksh's statutory declaration of that date.

The Reasons for Decision do not refer to any of these three documents. They do, however, note that "the Departmental file contained the completed form of application to Remain in

Australia" signed by Mr Prasad. This indicates that the IRT referred to the file. However, this may have occurred in response to Mr Buksh's evidence relating to that form and for

the purpose of locating it. It is not known to what extent, if at all, the IRT read the content of the Departmental files in other respects. I do not infer, from the presence of the three documents in the Departmental file and from the fact that files were "before" the IRT, that the decision of the IRT was actually induced or affected by any of the three documents.

In relation to the evidence given by Mr Buksh, the IRT expressed its conclusion as follows:

"The Tribunal has also considered the evidence of Mr Buksh and the weight that should be given to it considering that he is in dispute with Ms Wati over legal matters to do with an unrelated transaction. The Tribunal has accepted Mr Buksh's evidence to the extent that he believed Ms Wati to be in a relationship with Mr Prasad and Ms Kumari to be in a de facto relationship with Mr Darwiche." (Reasons for Decision, pp 14-15)

The perception of their landlord, Mr Buksh, of the relationship between Ms Wati and Mr Prasad was a matter relevant to be taken into account by the IRT. It seems to me that the IRT was seeking to emphasise in the passage quoted that it accepted Mr Buksh's evidence only to the limited extent that it showed his perception of the relationship referred to. The IRT was clearly and correctly cautious in its approach to Mr Buksh's evidence.

I turn now to consider the affidavits which were read on

behalf of Ms Wati. The affidavit of Ms Ahmed is not persuasive. First, her statutory declaration, bearing date 18 December 1995 and received by the IRT on 19 December 1995, played no part, so far as the evidence reveals, in the formulation of the IRT's Reasons for Decision. Those Reasons for Decision were dated 19 December 1995 and were despatched to Ms Wati on 20 December 1995. Ms Ahmed is not recorded in the Reasons for Decision as a person who gave oral evidence to the IRT.

In any event, Ms Ahmed's sworn statement that "the information in the statutory declaration is incorrect" is quite unsatisfactory. There are numerous statements in the statutory declaration and the deponent does not identify which ones are incorrect. In any event, incorrectness is not synonymous with fraud. Ms Ahmed does not even depose that she knew at the time of making the statutory declaration that "the information in the statutory declaration" was incorrect.

The affidavit of Manjula Chandra is also unsatisfactory. For all that her affidavit shows, the Latchmi letter may be truthful in all respects. At most, her affidavit raises a suspicion that the late Mr Buksh may have signed, or procured the signature of, the letter. Neither of these facts demonstrates that the content of the Latchmi letter is not true.

The final affidavit is that of Naresh Prasad. His evidence may show that the late Mr Buksh was vengeful or spiteful but it does not demonstrate fraud.

In the result, the evidence does not establish that the decision of the IRT was induced or affected by the fraud of the late Mr Buksh or of any other person.

CONCLUSION

The application must be dismissed with costs.

I certify that this and the preceding 28 pages are a true copy of the Reasons for Judgment of the Honourable Justice Lindgren.

Associate:

Dated: 29 November 1996

Heard: 14 November 1996

Place: Sydney

Decision: 29 November 1996

Appearances: Mr R Toner of counsel instructed by Crichton-Browne Crossley appeared for the applicant.

Mr B J Preston of counsel instructed by the Australian Government Solicitor appeared for the respondents.

